

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EM11RM-63534
REF. AGENCY NO. 17E-2013-00149

Tyrone Alexander,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDING OF PROBABLE CAUSE
)	
CorePharma, L.L.C.,)	
)	
Respondent.)	

On December 7, 2012, Sayreville resident Tyrone Alexander (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that his former employer, CorePharma, L.L.C. (Respondent), discriminated against him based on his race, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and Title VII of the Civil Rights Act of 1964 (Title VII). Respondent denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

On February 6, 2012, Respondent, a pharmaceutical manufacturer located in Middlesex, hired Complainant to work as a Production Technician II for \$20/hour. Complainant was assigned to assist in the production of a muscle relaxant called *Metaxalone*. The final blend of the drug is performed by two-person teams of production technicians that combine several chemicals and follow a prescribed sequence called a "batch record." After each stage in the process, both team members are required to verify in writing that all the proper steps were taken in the correct order.

On November 19, 2012, Respondent discovered that there had been a deviation from the batch record during the final blend stage. It conducted an internal investigation and concluded that the following six production technicians had improperly deviated from the batch record by performing at least one of the blending steps out of order, and that each had falsified documents by signing the batch record verifying that the steps had been taken in their proper order: Complainant (African-American); Charles Williams (African-American); John Loynes (African-American); Peter Stopinski (Caucasian); Carlos Tavera (Hispanic); and Kenton Foster (Caucasian).

Williams, Loynes, and Tavera were Production Technician II's like Complainant. Stopinski had more experience than Complainant and held a higher title, Production Technician IV. Foster had less experience than Complainant and was a Production Technician I.

Respondent claims that during the course of its internal investigation, several production technicians admitted violating the batch record by performing one of the steps out of order (i.e., adding magnesium stearate to a drum that already contained *Metaxalone*, instead of first screening the magnesium stearate into an empty drum as required). Respondent noted that Loynes, for instance, admitted to never following the batch record precisely and reportedly claimed that everyone with whom he worked "did it this [improper] way."

Respondent told DCR that in assessing the individual culpability of each technician, it considered how many batches of Metaxalone each had previously blended. It determined that Complainant had blended eleven batches,¹ Loynes had blended thirteen batches, Williams had blended eight batches, Stopinski had blended four batches, and Tavera and Foster had blended one batch apiece. It suggested that employees who had sufficient knowledge of the process had more culpability than those with less experience. See e.g., Respondent, Response to DCR's Third Document and Information Request, Feb. 27, 2014, p. 3-4 (noting "[A]s [Tavera and Foster] had created only a limited number of batches, the Company considered them in training. Stopinski had also made significantly fewer batches than Loynes, Williams, and Alexander and was still considered a trainee.").

On November 27, 2012, Respondent fired Complainant, Loynes, and Williams.² Stopinski, Tavera, and Foster were issued a final warning and three-day suspension.

Respondent acknowledged that there was no physical evidence to support its conclusion that Complainant had deviated from the batch record but stated that Complainant admitted signing the batch record without always actually observing that all steps were done properly by the technician with whom he was working. Ultimately, it concluded that Complainant "consciously violated the batch record" by adding magnesium stearate to a drum that already contained granulated Metaxalone, and falsified documents. See M. Rogers, Esq., Respondent's Position Statement, Feb. 19, 2013, p. 10. During the course of the DCR investigation, Respondent provided an additional justification, noting that Complainant had "not trained properly" Tavera and Foster in the mixing process. See Response to Third Doc. and Info. Request, supra, at 3.

Respondent told DCR that prior to the incident that led to Complainant's discharge, a similar incident occurred where Respondent discovered a deviation in the manufacturing of Metaxalone. As a result, Respondent fired two technicians—one was Caucasian and the other was Asian—and conducted a mandatory corrective training session attended by 27 production technicians on May 2, 2012, where it made clear that such conduct would not be tolerated. Respondent wrote:

During this training, CorePharma described the other employees' deviation from the batch record and their falsification of documents. CorePharma advised the production technicians that the technicians responsible for the deviation had been terminated. Through this training, CorePharma instructed the production technicians to complete all steps of the batch record in the order directed and made it clear that any deviations would result in termination of employment. Complainant deviated from the batch record the exact way he was instructed not to, despite this training.

See Respondent's Position Statement, supra, at 5. Respondent stated that the three technicians who were fired attended the training.

¹ According to Respondent's records, Complainant blended Metaxalone at least fifteen times, not eleven. For the purpose of evaluating Respondent's proffered reason for terminating Complainant, the investigation accepted the numbers Respondent provided as its basis for determining experience level.

² Williams filed a separate complaint with DCR alleging race discrimination arising from the same circumstances. See Williams v. CorePharma, LLC, DCR Docket No. EM11RM-63538 (Dec. 7, 2012). The matters were investigated together and the same attorney represented Respondent in both matters.

Complainant alleged that Respondent's explanation for subjecting him to a more severe discipline was merely a pretext designed to mask race discrimination. Complainant found it significant that a more experienced Caucasian employee with a higher title, Stopinski, was not discharged, nor were other non-African-American employees who committed the same offense. Complainant also alleged that Respondent failed to follow the progressive discipline procedures of its Employee Handbook prior to firing him, while affording those protections to the non-African-American employees for the same incident.³

Respondent rejected the notion that Complainant and Stopinski were similarly-situated. It argued that although Stopinski was a Production Technician IV and had more seniority than Complainant, he was relatively new to the production of Metaxalone and considered to still be in training on the production of that drug. Respondent also stated that Stopinski and the other two technicians did not have the benefit of the May 2, 2012 mandatory training.

It characterized Stopinski as "forthcoming" in his admission of error. According to Senior Manager Tom Hall, who headed the internal investigation, Stopinski admitted that he knew that he was supposed to screen the magnesium stearate into an empty drum and failed to do so. Similarly, Senior Director of Operations John Salvagno told DCR that Stopinski admitted falsifying the record by signing the batch record despite knowing that the required process was not followed.

Complainant claimed that the supervisor in charge of the Granulation Department, Bill Cummings, who is Caucasian, was an official trainer and had taught Complainant the process for blending Metaxalone. Respondent did not refute those assertions.⁴

Loynes told DCR that he never stated that he and others always deviated from the batch record. Loynes stated that he told Respondent during the internal investigation that each time he mixed Metaxalone in the way characterized as improper, he was being supervised by Cummings. Loynes stated that he merely asked during the internal investigation how he could be held accountable for deviating from the batch record when Cummings saw him mixing Metaxalone improperly and never corrected him.

Stopinski appears to have raised the same issue during the internal investigation. Hall's notes from Stopinski's interview state that he has "been doing it this way since he was trained" and he was "never challenged . . . by other tech's or Supervisor or Q.A."

It appears that another production technician (not one of the six who received discipline) told Hall during his internal investigation that he reported improper blending to Cummings several weeks prior to the November 19, 2012 incident.

There is no indication that Respondent made any effort to determine whether Cummings had any degree of culpability for failing to properly train and/or supervise the technicians in his department, or that he was even questioned during the internal investigation into the deviated

³ Respondent's Employee Handbook provides graduated discipline beginning with Verbal Counseling/Warning, followed by Written Warning, and ending with Discharge/Termination. Respondent's Employee Warning Notice provides for a first, second, and final warning prior to discharge.

⁴ Respondents provided a written description of a Cumming's job duties, which included, "Ensure manufacturing of products . . . in accordance with quality standards . . . trains staff . . ." See Response to Third Doc. & Info. Request, supra, at Ex. C.

batch. When asked about Cummings' responsibility, particularly given the suggestion that technicians were regularly deviating from the batch record, Respondent replied that its technicians are trusted to follow policy and a supervisor cannot always be present in the area where blending occurs.

Lastly, Complainant alleged that he had no prior disciplines, and that Stopinski received preferential treatment despite having a disciplinary history. According to Respondent's records, Stopinski received his first warning for a policy infraction before he began working in the Granulation Department where Metaxalone is produced. He received a second warning on May 25, 2011, for failing to properly verify raw material labels. Two days earlier, on May 23, 2011, Respondent held a training session to stress the importance of following all of its procedures and policies, and to inform that discipline will be administered for policy violations. Its records show Stopinski was in attendance. The warning Stopinski received on November 27, 2012, for the deviation incident at issue, was his third. Stopinski's personnel file includes a memo recommending Stopinski's promotion to Production Technician IV and suggests that he had considerable experience. That memo states in part:

Stopinski's performance has consistently met and surpassed the requirements of a Tech Level II. He is very knowledgeable in regards to all the functions of Pharmacy . . . He is also cross-trained in the Granulation Department [i.e., where Metaxalone is blended]. He is trained and qualified in the AMF, Gemco Blenders, Sejong High Shear mixers, Fitzmill and Gehnrich steam heated drying ovens. His understanding of all manufacturing processes has been invaluable. . . He has worked in the Pharmaceutical environment for some time . . .

See Memo from Vasant Kamatmhamai, Manufacturing Manager, to HR, Re: Peter Stopinski, Sept. 26, 2011.

The LAD makes it illegal to terminate or otherwise discriminate against an employee in the "terms, conditions or privileges of employment" based on race. N.J.S.A. 10:5-12(a). At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid.

A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid. Mindful of those guidelines, the Director hereby finds—for purposes of this disposition only—as follows.

Respondent found that six employees violated protocol during the manufacture of a certain product. There was an indication that a seventh employee (i.e., the employees' supervisor) showed them the improper way of making the product and/or was aware that they were deviating from protocol but, for whatever reason, did not intervene. Respondent responded by firing the three African-American employees (i.e., Complainant, Williams, and Loynes) but not the four non-African-American employees (i.e., Stopinski, Tavera, Foster, and Cummings). Three of the four non-

African-American employees were reportedly subjected to progressive discipline as prescribed by the Employee Handbook. The fourth was not disciplined at all.

When meting out disciplines, Respondent appears to have considered, among other things, how many previous batches each technician had blended, and held employees who were more familiar with the process to a higher standard. That explanation—if consistently applied—would suggest a legitimate non-discriminatory business rationale. However, there were uncontradicted allegations that Manufacturing Supervisor Bill Cummings was more experienced and more knowledgeable about the process than Complainant (and the other African-American employees who were fired), and may have been complicit in a series of batch deviations but was not disciplined.

Likewise, Stopinski had more experience in Respondent's pharmaceutical production than Complainant and the other African-American employees who were fired. Respondent notes that at the relevant time, Stopinski "had been with the Company for one year and ten months . . . while Complainant . . . had only been with the company for nine months." See Position Statement, supra, at 9. Respondent counters that Stopinski made fewer batches of Metaxalone than Complainant and was still "in training" with respect to that specific drug, suggesting that his error could be attributed to mere ignorance of the specific mixing procedure. But that argument runs counter to the fact that Stopinski admitted that he knew that he was supposed to add magnesium stearate into an empty drum and simply failed to do so.

Respondent suggests that Complainant's conduct was more egregious than his non-African-American counterparts because he attended a training on May 2, 2012, which specifically emphasized the required steps for mixing Metaxalone. Although Stopinski did not attend that training, he attended a separate training on May 23, 2011, which stressed the importance of following all manufacturing procedures and policies. But even if Stopinski had not attended either training, the fact remains that he openly admitted that he knew the correct process for making Metaxalone and chose not to follow it. If knowledge of the proper protocol means that any deviation is a "conscious[]" violation, as Respondent argues, then it would appear that Stopinski committed a conscious violation.

Incidentally, two days after Stopinski attended the May 2011 training that stressed the need to follow proper procedures, he reportedly failed to do so and received a second discipline. This leads to another concern. Complainant was fired despite having no disciplinary history. Stopinski, by comparison, had two prior disciplines on his record and so, according to company policy, could have been fired for his third offense. Stated differently, after Stopinski and Complainant committed the same offense, the more experienced Stopinski was spared from the penalty imposed by the company's progressive discipline system whereas Complainant was not afforded the progressive discipline protections on the grounds that he was more experienced.

Respondent stated that another consideration was that Complainant was entrusted with training other employees and taught them the wrong way to blend the ingredients. There is no indication that Complainant held the title or formal responsibilities of a trainer. There is no mention of training responsibilities in the written job description for Production Technician II. On the other hand, Stopinski's job duties as a Production Technician IV included performing the "duties of supervisor during their absence" and providing "departmental training to other production technicians as needed." See Response to Document & Information Request, Feb. 19, 2013, Ex. D.

But even assuming for the moment that Complainant was a trainer, and that Respondent was holding employees with heightened responsibilities to a higher standard, it points to another

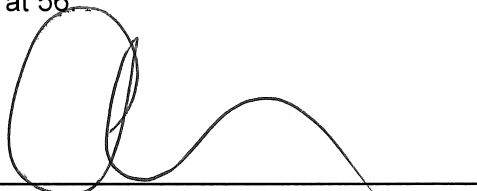
inconsistency. Cummings was seemingly exonerated despite being directly responsible for training and supervising technicians who reportedly admitted deviating from the batch record on a regular basis. Indeed, Cummings was also in attendance during the May 2, 2012 training which, according to Respondent, would further subject him to heightened scrutiny. And there was also an indication that Cummings had been warned about improper blending several weeks before the incident at issue.

Respondent suggested that a mitigating factor in Stopinski's favor was that he was "forthcoming" when questioned during the internal investigation. Once again, that might be a reasonable and legitimate non-discriminatory explanation for imposing a more lenient discipline. However, it appears that Complainant was similarly forthcoming during the internal investigation. See, e.g., Respondent's Position Statement, supra, at p. 6. ("Tom Hall . . . and Joe Marino . . . interviewed the production technicians assigned to Metaxalone, including Complainant, who admitted to violating the batch record by performing one of the last steps in the production of Metaxalone out of order . . . Complainant admitted that he signed batch records despite knowing the process was performed incorrectly."). And as noted earlier, Respondent claims that Loynes admitted that he never followed the batch record precisely. There is no indication that Complainant and Loynes' alleged candor during the internal investigation was viewed as a mitigating circumstance—both were fired.

In view of the concerns raised above, the Director finds at this threshold stage in the process that there is a sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56.

DATE:

2-9-15



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS